No. 18-966

IN THE
Supreme Court of the United States

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,
Petitioners,

v.

STATE OF NEW YORK, ET AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF FORMER FEDERAL DISTRICT JUDGES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici, listed in an appendix to this brief, are former federal district judges who were appointed by both Republican and Democratic presidents and sat on courts across the country, resolving disputes over practically every type of dispute that is litigated in federal court. *Amici* thus know from first-hand experience that a federal district judge has a unique perspective: no one else can watch the entire case unfold, disinterestedly hearing the views and arguments of the parties and considering the entire record in context over an extended period of time. *Amici* have differing views of the merits of the citizenship question at issue in this case. But they are united in their views regarding the importance to the federal judicial system of the longstanding tradition of appellate deference to district judges' factual findings.

INTRODUCTION

Faithful application of the well-established standard of deference to a district court's factual findings should result in affirmance of the judgment below. The government conceded below that, as a matter of law, a pretextual explanation for agency action violates the Administrative Procedure Act. *See* Pet. App. 312a. The district court found, based on careful consideration of an extensive record, that the Commerce Secretary's rationale for including the citizenship question was, in fact, pretextual. It also found that the Census

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* also represent that all parties have consented to the filing of this brief.

Bureau's own analysis showed that inclusion of the question would not, contrary to the Secretary's assertions, enhance the accuracy of the census.

Those factual findings must be reviewed pursuant to a deferential clear-error standard of review. That deferential standard dates back to the federal judiciary's earliest years, and it is critical to both the proper functioning and legitimacy of the federal courts. Indeed, the core competency of the federal district courts is the resolution of factual questions. Substituting fact-findings by appellate courts, which are farther removed from the evidentiary record, undermines the proper functioning of the federal judiciary. Appellate courts are not designed to retry cases. Moreover, giving litigants a second bite at the apple will incentivize litigants to take appeals in the hopes of relitigating the facts.

Perhaps even more important, public confidence in federal trial courts depends on the presumption that district judges are competent and impartial. Second-guessing district judges in their own bailiwick undercuts that presumption and delegitimizes federal trial courts. With the legitimacy and impartiality of the federal judiciary under attack, adherence to the ordinary rules of civil procedure is especially critical. *Amici* thus urge the Court, in resolving this case, to remain faithful to the deferential clear-error standard and affirm the judgment below.

SUMMARY OF ARGUMENT

Under Federal Rule of Civil Procedure 52, the factual findings of a district court must stand unless clearly erroneous. That rule plays a critical role in the functioning of the judicial system and recognizes that district courts are situated best to resolve factual questions.

I. From the earliest days, this Court has made clear that its role, like that of other appellate courts, is not to retry cases or reexamine the conclusions of trial courts on disputed factual issues. Almost from the inception of the federal judicial system, factual findings of courts sitting in equity were entitled to great weight; the findings of courts sitting at law were entitled to *conclusive* weight. Both forms of review recognized the superior ability of the trial court to examine both live testimony and documentary evidence in the context of the entire record.

After the merger of law and equity, the Federal Rules of Civil Procedure adopted the equity standard of review. Rule 52 commands this Court, like the courts of appeals, to let stand factual findings even if the reviewing court would have found that the evidence led to a different result, unless the trial court *clearly* erred. This Court has explained that Rule 52 does not make exceptions – it does not allow greater latitude where factual findings are based on documentary evidence or deposition testimony, and it does not treat "ultimate" facts any differently than subsidiary historical facts.

II. Deferential review benefits the judicial system in several important ways. It recognizes that, more often than not, a district court seeing the entire case unfold will come to a more accurate conclusion than a reviewing court that must make its decision based on

a cold record. It conserves the resources of appellate courts, allowing them to focus on difficult legal questions instead of being required to pore through voluminous records. It discourages meritless appeals that, in effect, seek to retry factual issues in the hope that a second fact-finder will have a different view of the evidence. And by focusing appellate courts, trial courts, and the parties on their respective roles, it leads to better outcomes at every level of the judicial system.

Deference also contributes to the legitimacy of the district courts and reaffirms public confidence in the competence and fairness of trial judges. Fact-finding is the core role of trial courts, and upholding that role signifies that the trial courts are succeeding in their most important responsibility, while invalidating their findings signals that they are failing. District courts are the face of the federal judiciary to many Americans, and a loss of confidence in them detracts from the legitimacy of the federal system as a whole. Strict adherence to Rule 52's mandate is especially critical today, when the judiciary is under attack and accused of bending procedural rules to favor certain ideological or political positions.

III. Proper deference to the district court's fact-finding is dispositive here. *First*, as the government conceded below, a pretextual explanation for agency action violates the Administrative Procedure Act ("APA"), *see* Pet. App. 312a, and specifically the APA's requirement that an agency explain the basis for its actions. The district court's finding that the Secretary's announced reason was pretextual is supported by ample record evidence. In many cases, the district court relied on undisputed historical facts about the timeline of the administrative process. In resolving

other questions, the district court considered competing accounts of historical facts and inferred intent from statements that, while conceivably open to alternative interpretations, certainly supported the district court's determinations. The district court did not clearly err in finding that the Secretary's reasons were pretextual.

Second, the district court properly found that the Secretary's stated purposes were not logically connected to the evidence before the agency at the time. A variety of empirical evidence supported this finding, including the Census Bureau's contemporaneous analyses and the testimony of the government's own expert witness. Deference is particularly appropriate where, as here, the district court must understand and apply technical concepts, as explained by extensive testimony from a variety of experts, in order to resolve factual disputes. The government cannot point to any record evidence showing error, let alone clear error, by the district court.

ARGUMENT

I. DEFERENCE TO THE DISTRICT JUDGE'S FACTUAL FINDINGS IS DEEPLY INGRAINED IN AMERICAN LAW

Appellate deference to factual findings by a trial judge has been a key part of the judicial system and the division of judicial labor since the earliest period of American law. Indeed, under the Judiciary Act of 1789, many findings of fact were virtually unreviewable, reflecting the longstanding principle that parties had one opportunity to put on evidence and prove their case, and that appellate courts existed to guide the development of the law, not retry cases. Deference has become less extreme over time, but that core principle has carried through the merger of law and

equity and the institution of the Federal Rules of Civil Procedure, and remains a central part of the proper functioning of the judicial system today.

A. Deference to Judicial Findings of Fact Has Been a Continuous Feature of the Federal Judicial System Dating Back to Its Earliest Years

1. Appellate review of judicial findings of fact began with review of courts sitting in equity. Actions at law were always tried before a jury; thus, there were no judicial findings to review.[2] A trial court sitting in equity, however, necessarily made its own factual determinations in addition to applying legal principles to those facts.

In one of its earliest cases, *Wiscart v. D'Auchy*, 3 U.S. (3 Dall.) 321 (1796), this Court held that, under the Judiciary Act of 1789, factual findings of a trial court sitting in equity were entitled to conclusive weight. At issue was the effect of § 19 of the Act, which required that trial courts, in issuing decisions, "cause the facts on which they found their sentence or decree, fully to appear upon the record either from the pleadings and decree itself," unless the parties stipulated to a statement of the case. Ch. 20, 1 Stat. 73, 83. The Court held that the required statement was "conclusive as to all the facts, which it contains," because the Supreme Court could review it only by

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[2] *See* John F. Nangle, *The Ever Widening Scope of Fact Review in Federal Appellate Courts—Is the "Clearly Erroneous Rule" Being Avoided?*, 59 Wash. U.L.Q. 409, 412-13 (1981). Further, in the earliest days, a verdict could be reviewed only by a "writ of error," which allowed the reviewing court to correct only legal errors that appeared on the face of the record. *See* Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 Seattle U.L. Rev. 11, 15-16 (1994).

writ of error (not by appeal) under § 22 of the Act. 3 U.S. (3 Dall.) at 324. Defending that holding, Chief Justice Ellsworth explained that he saw no need to strain the language of the statute to allow for plenary review, because there was no injustice in treating the circuit court's findings as conclusive:

> [S]urely, it cannot be deemed a denial of justice, that a man shall not be permitted to try his cause two or three times over. If he has one opportunity for the trial of all the parts of his case, justice is satisfied; and even if the decision of the Circuit Court had been made final, no denial of justice could be imputed to our government; much less can the imputation be fairly made, because the law directs that in cases of appeal, part shall be decided by one tribunal, and part by another; the facts by the court below, and the law by this court. Such a distribution of jurisdiction has long been established in England.

Id. at 328-29 (opinion of Ellsworth, C.J.).

After *Wiscart*, Congress provided for direct appeal to the Supreme Court in equity and admiralty cases,[3] leading the Court to consider the proper weight to accord factual findings. Although, theoretically, the Court could reexamine "the entire case," in practice it deferred substantially to trial courts' findings of fact.[4] Resolution of conflicting evidence was for the trial court; as the Court put it, "[i]t is not enough for the

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[3] *See The San Pedro*, 15 U.S. (2 Wheat.) 132, 141 (1817). Review of admiralty cases, though generally considered equivalent to review of equity cases, was subsequently circumscribed by an 1875 statute.

[4] Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term, 1929*, 44 Harv. L. Rev. 1, 28 (1930).

appellant merely to raise a doubt on conflicting testimony, that the judgment of the Court below may possibly be erroneous." *The Ship Potomac*, 67 U.S. (2 Black) 581, 584 (1862).[5]

After equity appeals began to flow to the circuit courts of appeals in 1891, those courts took a similarly deferential approach to factual findings. Although the circuit courts had the power to review factual findings *de novo*, it became well-established practice to defer unless it "clearly appear[ed] . . . that the great weight of the evidence is clearly contrary to the factual finding of the sitting justice, or the inference of the sitting justice from proven facts is unreasonable." *New York Life Ins. Co. v. Simons*, 60 F.2d 30, 32 (1st Cir. 1932).[6]

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[5] Magnifying that deference was the fact that trial courts commonly referred cases to masters in equity. The trial court itself gave great deference to masters' findings, refusing to "retry and reexamine and decide on all the questions of fact," unless there was "a clear mistake[] or a palpable abuse of power." *Mason v. Crosby*, 16 F. Cas. 1029, 1032 (C.C.D. Me. 1847) (No. 9,236). After all, if parties could retry all facts anew, a referral would be "little aid in the administration of justice." *Id.* This Court, in turn, deferred to the trial court's adoption of a master's findings: "[T]hey are to be taken as presumptively correct; and unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand." *Furrer v. Ferris*, 145 U.S. 132, 134 (1892); *see also Metsker v. Bonebrake*, 108 U.S. 66, 72 (1883) ("The findings of the master are *prima facie* correct.").

[6] *See also Woods-Faulkner & Co. v. Michelson*, 63 F.2d 569, 571 (8th Cir. 1933) ("Whatever uncertainty or conflict there may have been in the testimony . . . was resolved by the lower court in favor of the plaintiff, and we are of the view that this finding should not be disturbed."); *Youngblood v. Magnolia Petroleum Co.*, 35 F.2d 578, 579 (10th Cir. 1929) ("[W]hen a court of equity has considered conflicting evidence, and made a finding and decree, it is presumptively correct, and, unless some obvious error of law

This Court continued to defer to factual findings unless "clearly and manifestly wrong," *Butte & Superior Copper Co. v. Clark-Montana Realty Co.*, 249 U.S. 12, 30 (1919), giving special deference when the circuit and district courts concurred on issues of fact, *see, e.g.*, *Baker v. Schofield*, 243 U.S. 114, 118 (1917).

2. The tradition of deference to judicial fact-findings at common law dates back to the mid-nineteenth century. In the earliest years of the Republic, "[t]he finding of issues in fact by the court upon the evidence [wa]s altogether unknown" in cases at law. *Campbell v. Boyreau*, 62 U.S. (21 How.) 223, 226 (1859). Juries, not judges, served as fact-finders; while it was settled that a jury's verdict had "conclusive effect in the appellate court," there was no need for a separate standard of review for judicial fact-findings. *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. (3 Pet.) 433, 448 (1830).

The standard of review for judicial findings in cases at law first arose when Congress provided that federal courts in Louisiana could follow local state courts in trying cases at law without a jury, a consequence of Louisiana's history as a civil law jurisdiction. *See The Abbotsford*, 98 U.S. 440, 442 (1879). This Court held that the judge's fact-findings in that context were subject to the same standard of review as a jury's – *i.e.*, that "the decision of the Circuit Court upon [a] question of fact must, like the finding of a jury, be regarded as conclusive." *United States v. King*, 48 U.S. (7 How.) 833, 845 (1849).

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has intervened or some serious mistake of fact has been made, the finding or decree must be permitted to stand."); *Espenschied v. Baum*, 115 F. 793, 793 (7th Cir. 1902) (per curiam) ("Under such circumstances, a very clear and palpable error in the facts must be shown on appeal.").

The issue became more widespread when Congress provided for the waiver of jury trials in all federal courts in 1865. *See* Act of Mar. 3, 1865, ch. 86, § 4, 13 Stat. 500, 501. Section 4 of the Act provided that trial courts could make "general" or "special" findings; general findings were as conclusive as a jury verdict, but, if the court made special findings, appellate review could "extend to the determination of the sufficiency of the facts found to support the judgment." *Id.* Even then, however, the appellate court could consider the sufficiency of the findings to support the legal judgment, but could not consider the sufficiency of the evidence to support the findings. *See Norris v. Jackson*, 76 U.S. (9 Wall.) 125, 127-28 (1870). Thus, "[w]here a case is tried by the court, a jury having been waived, its findings upon questions of fact are conclusive in the courts of review, it matters not how convincing the argument that upon the evidence the findings should have been different." *Dooley v. Pease*, 180 U.S. 126, 131 (1901). The practice of treating judicial fact-findings on equal footing with jury verdicts continued until the adoption of the Federal Rules of Civil Procedure in 1938.[7]

B. The Federal Rules of Civil Procedure Adopted the Equity Standard of Appellate Review for All Factual Findings

The Federal Rules of Civil Procedure merged the rules of law and equity and, in Rule 52, unified the appellate standard of review for judicial findings of fact. Rule 52 provided, in pertinent part, that "[f]indings of fact shall not be set aside unless clearly

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[7] The writ of error was replaced by appeal in 1928, but there was no substantive change until the merger of law and equity. *See* Kunsch, 18 Seattle U.L. Rev. at 18 & n.45.

erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Fed. R. Civ. P. 52(a) (1938). The rule effectively adopted the existing practice in equity cases, rather than the even more stringent standard applied in law cases (though not without debate[8]). *See United States v. United States Gypsum Co.*, 333 U.S. 364, 394-95 (1948). In its earliest articulation of the rule, this Court explained that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* at 395.

As this Court has long stated, the clear-error rule stands as a "clear command" to appellate courts, including this one. *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985). The "reviewing court" has a "duty" not "to duplicate the role of the lower court." *Id.* at 573. That "duty" binds appellate courts to affirm even when they might disagree with the district court's findings:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it *even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.* Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Id. at 573-74 (emphasis added).

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[8] *See generally* Nangle, 59 Wash. U.L.Q. at 413. Among others, the Reporter of the first Advisory Committee, Judge Charles E. Clark, favored the even more deferential standard then applicable to jury-waived trials at law.

For a time, some commentators and courts suggested that greater deference was due to findings of fact based on live testimony, and particularly the credibility of witnesses, while less deference was proper for findings based on documentary evidence. *See, e.g., Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 614 (7th Cir. 1982). This Court made clear, however, that Rule 52 makes no such distinction. Rule 52 commands deference "even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Anderson*, 470 U.S. at 574. To remove any doubt that a lower standard applied to findings of fact based on documentary evidence, the Court amended Rule 52 in 1985, removing any reference to live testimony. The advisory committee's note explained that the amendment aimed

> (1) to avoid continued confusion and conflicts among the circuits as to the standard of appellate review of findings of fact by the court, (2) to eliminate the disparity between the standard of review as literally stated in Rule 52(a) and the practice of some courts of appeals, and (3) to promote nationwide uniformity.

Fed. R. Civ. P. 52 advisory committee's note to 1985 amendment. Thus, appellate courts must let stand all findings – whether based on live testimony, depositions, documentary evidence, or otherwise – unless they are clearly erroneous.

This Court has also rejected any distinction between "ultimate" facts and "subsidiary" facts. *See Pullman-Standard v. Swint*, 456 U.S. 273, 287-88 (1982). The Court explained that Rule 52

> does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.

Id.; *see also Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960) ("[t]he rule itself applies also to factual inferences from undisputed basic facts"). *Cf. Wiscart*, 3 U.S. (3 Dall.) at 330 (opinion of Ellsworth, C.J.) (finding of fraudulent intent "is not an inference from a fact, but a statement of the fact itself"). Thus, whether based on testimony or documentary evidence, and whether the fact is considered "ultimate" or "subsidiary," Rule 52 and this Court's precedents command deference to the district court's factual determinations.

II. DEFERENCE TO TRIAL COURTS' FACTUAL DETERMINATIONS IS CRITICAL TO THE PROPER FUNCTIONING OF THE FEDERAL JUDICIARY

Deference to trial courts is not only deeply rooted in American law; it also serves important purposes for the federal judiciary: (1) it improves adjudication of disputed facts by placing the fact-finding function in the hands of trial judges who specialize in resolving factual disputes; (2) it is critical to judicial efficiency by reducing the number of appeals; and (3) it enhances the legitimacy of district courts and the federal judiciary as a whole. Trial courts also are situated best to resolve questions of fact. Appellate "fact-finding" is at least as likely to introduce error as to correct it, as the appellate court may misapprehend important evidence or the record as a whole.

A. Deference to Trial Courts Promotes More Accurate Factual Findings

The clear-error standard recognizes that district courts are, on balance, better situated than appellate courts to come to the correct conclusion on disputed factual issues. Of course, district judges have a comparative advantage in assessing live testimony, which the reviewing court cannot. *See Anderson*, 470 U.S. at 575 ("[O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said."). But even where the district court is assessing only documentary evidence or deposition testimony, the trial judge has a comparative advantage. As one district judge has explained:

> Even when findings are drawn from undisputed facts or documents, a trial judge who has participated in the case from the beginning and has seen its entire mosaic unfold should be better able to determine the facts than an appellate judge. Even in assessing a witness' deposition a trial court will weigh the witness' testimony in the context of the entire trial and, oftentimes, determine credibility of a deposition witness based on veiled references made by live witnesses.[9]

District judges have "the familiarity of prolonged exposure" to a case,[10] and, as many courts have recognized, "develop expertise at making inferences from testimony and evidence because it is a function they

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[9] Nangle, 59 Wash. U.L.Q. at 425.

[10] Edward H. Cooper, *Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 Notre Dame L. Rev. 645, 654 (1988).

perform all the time."[11] They are well-equipped to resolve questions that involve "practical human experience" and "multiplicity of relevant factual elements, with their various combinations." *Duberstein*, 363 U.S. at 289. And where scientific or technical expertise is needed, the district judge acquires familiarity with the subject matter through the testimony of experts for all sides and, in some cases, actual scientific demonstrations. *See Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 274 (1949) ("To no type of case is [Rule 52(a)] more appropriately applicable . . . ."), *adhered to on reh'g*, 339 U.S. 605 (1950). Thus, "deference is '[p]articularly' appropriate when the issues require familiarity with 'principles not usually contained in the general storehouse of knowledge and experience.'" *Silvester v. Becerra*, 138 S. Ct. 945, 950 (2018) (Thomas, J., dissenting from the denial of certiorari) (quoting *Graver Tank*, 339 U.S. at 610) (alteration in original).

Further, deference by appellate courts encourages district courts to pay especially close attention to disputed factual issues, recognizing that the parties have only one chance to present their evidence. "[A] judge who knows that the central responsibility of decision cannot be shared is likely to take the task of decision more seriously."[12] In contrast, when appellate courts reverse because they merely have a different view of the evidence, a district judge has less incentive to weigh the evidence carefully or make thorough

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[11] Kunsch, 18 Seattle U.L. Rev. at 20; *see also* Bryan L. Adamson, *Federal Rule of Civil Procedure 52(a) as an Ideological Weapon?*, 34 Fla. St. U.L. Rev. 1025, 1044-45 (2007) ("As the role of trial judge as fact finder becomes rooted, judges ideally adapt to and master the act of fact finding.").

[12] Cooper, 63 Notre Dame L. Rev. at 652.

findings, as the court's fact-finding may not affect the ultimate outcome.[13] And dividing primary responsibility for questions of fact from primary responsibility for questions of law encourages the parties to sharpen their presentation of the issues at the appropriate level and, as a consequence, results in better outcomes on both legal and factual questions. Parties "who know that they will not have any significant second chance to convince another tribunal on the facts must take the initial trial seriously. If there is any reason to believe in our adversary system of trial, more serious party effort should lead to better decisions."[14] A failure to defer to factual findings under Rule 52 consequently diminishes the quality of the fact-finding process in the first place.

B. Deference on Factual Findings Fosters Judicial Efficiency

The "clear error" rule also improves efficiency for the federal judiciary in two closely related ways. It conserves judicial resources directly by limiting the time appellate judges must devote to re-reviewing the parties' evidence. It also indirectly conserves resources by discouraging appeals that, in effect, merely seek to retry the case before a panel of appellate judges.

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[13] *See* Nangle, 59 Wash. U.L.Q. at 427. Judge Nangle observed from judicial meetings that appellate courts' failure to respect district courts' factual findings resulted in a "lowering in the morale of district court judges" that was "reflected occasionally in a 'what's the difference' attitude in opinion writing" and in more difficulty in filling judicial positions. *Id.*; *see also* U.S. Supreme Court, *2016 Year-End Report on the Federal Judiciary* 8 (Dec. 31, 2016) ("There are many easier and more lucrative ways for a good lawyer to earn a living."), https://www.supremecourt.gov/publicinfo/year-end/2016year-endreport.pdf.

[14] Cooper, 63 Notre Dame L. Rev. at 652.

Both courts and commentators have recognized that the limited time and energy of appellate courts will be wasted if they must reconsider every finding of fact and review the entire evidentiary record *de novo* upon request. Forcing a three-judge appellate panel to review facts *de novo* would entail "a huge cost in diversion of judicial resources," as well as wasting the resources of parties who "have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one." *Anderson*, 470 U.S. at 574-75. "[T]he structure of the court system . . . does not permit nor can sustain matters being fully relitigated at each level," and thus "having facts fully adjudicated at the trial level promotes efficiencies by relieving appellate courts of that often lengthy and arduous task."[15] Respecting the limitation of Rule 52 both spares appellate courts "the necessity of investigating completely the evidence buried in the record"[16] and allows them to "devote more of their limited capacities to developing the law."[17] Conversely, the "increased accuracy" of any "foray into the minutiae of the record" is doubtful. *Easley v. Cromartie*, 532 U.S. 234, 262 (2001) (Thomas, J., dissenting); *see also Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 518-19 (1984) (Rehnquist, J., dissenting) ("I am at a loss to see how appellate courts can even begin to make . . . determinations" about "the state of mind of a particular author at a particular time"). And, in addition to the challenge of reviewing an often extensive record, appellate judges sit in panels,

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[15] Adamson, 34 Fla. St. U.L. Rev. at 1045.

[16] Note, *The Law of Fact: Findings of Fact Under the Federal Rules*, 61 Harv. L. Rev. 1434, 1438-39 (1948).

[17] Cooper, 63 Notre Dame L. Rev. at 652.

so "conjoint fact-finding" creates an added layer of difficulty.[18]

Closer review of the record would add to the burden of the appellate court in any given appeal, but it also encourages additional appeals, multiplying the burdens on the system. Deference on factual issues discourages "bootless appeals in cases that, to a disinterested eye, are doomed from the beginning."[19] As Charles Alan Wright observed when arguing for even greater deference, a "broadened scope of appellate review . . . will mean an increase in the number of appeals,"[20] and the appeals encouraged by lax adherence to Rule 52 will be precisely those in which the only issue is fact-bound, has a marginal chance of success, and requires the appellate court to delve into the evidence. Minimizing the number of meritless appeals allows appellate courts to give proper attention to the already large volume of cases before them.

C. Failure To Give Proper Weight to the Factual Findings of District Courts Tends To Delegitimize Them in the Public's View

Failure to defer appropriately to district courts' fact-finding also has the broader effect of diminishing public confidence in trial courts and, consequently, in the judicial system.

Trial courts are often the public face of the judiciary, as the vast majority of adjudication occurs at the trial level. Although the individual federal district judges "are generally not well known," the federal judicial system "depends fundamentally on the[ir] skill, hard

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[18] *Id.* at 653.

[19] *Id.* at 652.

[20] Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751, 780 (1957).

work, and dedication."[21] Both lawyers and the public recognize that trial courts have the primary responsibility for the truth-finding function of the judicial system; appellate courts have a different role. Thus, as the Advisory Committee on the Federal Rules of Civil Procedure has observed, "[t]o permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants." Fed. R. Civ. P. 52 advisory committee's note to 1985 amendment.

Indeed, in the long run, one of "[t]he principal consequences of broadening appellate review" is to "impair[] the confidence of litigants and the public in the decisions of the trial courts."[22] Put another way, "sanctioning . . . factual second-guessing by appellate courts" will cause "only lessened confidence in the judgments of lower courts," *Bose*, 466 U.S. at 520 (Rehnquist, J., dissenting), and "undermine[] the presumption of competence trial judges possess."[23] In contrast, "[a]ffirming trial court decisions furthers jurisprudential values of comity and systemic legitimacy as well, reinforcing the correctness of those judgments and mitigating perceptions of unwarranted trial court bias."[24]

Reaffirming the legitimacy and competence of trial courts is particularly critical today. As one commentator presciently wrote in 2007:

> We live in a time in which the judicial system is under literal and figurative attack. Judicial independence is threatened by the sharp ideological

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[21] *2016 Year-End Report on the Federal Judiciary* 3.

[22] Wright, 41 Minn. L. Rev. at 779.

[23] Adamson, 34 Fla. St. U.L. Rev. at 1081.

[24] *Id.* at 1045.

> divide which exists on issues before the courts. Judges are accused not only of harboring substantive biases, but also of manipulating or ignoring procedural rules to advance their biases. If Rule 52(a) and fact typology are treated in a principled manner, the possibility or perception of bias can be mitigated and their effectiveness as an ideological weapon dulled.[25]

Failing to adhere closely to Rule 52, on the other hand, can create the perception of procedural manipulation. As Justice Scalia once wrote, overturning well-supported factual findings "makes evident that the parties to this litigation could have saved themselves a great deal of time, trouble, and expense by omitting a trial." *United States v. Virginia*, 518 U.S. 515, 585 (1996) (Scalia, J., dissenting) ("The Court simply dispenses with the evidence submitted at trial . . . in favor of the Justices' own view of the world.").

III. THE CLEAR-ERROR STANDARD MANDATES AFFIRMANCE OF THE DECISION BELOW

Faithful application of the clear-error standard requires affirmance here.

A. The District Court Based Its Finding of Pretext on a Substantial Body of Evidence Viewed in the Context of the Entire Record

As the government conceded below, a pretextual explanation for agency action violates the Administrative Procedure Act ("APA"), which requires that agencies provide the public with an accurate account of the basis of their actions. *See* Pet. App. 312a; *see also* Tr. of May 9, 2018 Conference at 15:10-12, ECF No. 150 ("I think we would agree if the plaintiffs on

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[25] *Id.* at 1087.

APA review can establish that the stated rationale is pretextual, that would be a basis for the Court to remand to the agency."). The district court found that Secretary Ross's justification for including the citizenship question at issue "was pretextual – that is, that the real reason for his decision was something other than the sole reason he put forward in his Memorandum" explaining his decision. Pet. App. 311a.

Pretext is a classic example of a fact that is rarely susceptible to direct proof and is almost always inferred from evidence of other historical facts. *See, e.g., Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000). The district court concluded that Secretary Ross's decision was pretextual based on a number of circumstances that pointed in the same direction. For one, there was evidence that Secretary Ross had already decided to add the citizenship question *before* the request from the Department of Justice that the Secretary later cited as the reason for adding the question. *See* Pet. App. 313a. Indeed, a number of undisputed facts supported that inference: Secretary Ross's discussion of defending the legal basis for the question in mid-2017, *id.* at 86a-87a; "attempts by Commerce Department staff to shop around for a request by another agency," *id.* at 313a; and the fact that the voting-rights explanation in the Department of Justice's request, subsequently cited by Secretary Ross as the sole purpose of adding the citizenship question, played no role in the initial discussions of the issue, *id.* at 314a. The district court more than adequately explained how these historical facts, in the overall context of the administrative record, led to the conclusion that Secretary Ross's explanation was pretextual. *See generally id.* at 313a-314a, 318a-321a.

The inference of pretext from those undisputed facts was buttressed by the district court's conclusion that

Secretary Ross "sought to conceal aspects of the process." *Id.* at 314a. Secretary Ross's failure to disclose much of the process in his ultimate memorandum explaining the decision, as well as his misleading testimony before Congress – that, among other things, the "Department of Justice . . . *initiated* the request for inclusion," *id.* at 72a – support this conclusion. The individual findings supporting this inference are myriad – for example, the district court considered two competing accounts of a meeting between Secretary Ross and an executive of the Nielsen Company, Christine Pierce – a meeting that Secretary Ross explicitly cited as supporting his action in including the citizenship question. *See id.* at 109a. Secretary Ross and Ms. Pierce disagreed on what Ms. Pierce said about the empirical data on the citizenship question, and the district court credited Ms. Pierce's account, particularly after the government "chose not to even cross-examine her." *Id.* at 112a. Neither account was facially implausible, and a district court's crediting of one plausible account over another is the kind of finding that "can virtually never be clear error." *Anderson*, 470 U.S. at 575. A misleading explanation, in turn, suggests something to hide. *See Reeves*, 530 U.S. at 147 ("Proof that the defendant's explanation is unworthy of credence . . . may be quite persuasive."). The inference that Secretary Ross attempted to conceal parts of the deliberative process constitutes further circumstantial evidence that his ultimate explanation for the addition of the census question was pretextual.

The government fails to address much of this evidence in its brief. Br. 40-45. To the extent the government challenges the evidence of pretext at all, it does so primarily by attacking the district court's interpretation of Secretary Ross's statements as

misleading. *See* Br. 44 (contending that the district court "strained to construe the Secretary's remarks and actions in the most uncharitable manner possible"). But it is hardly "uncharitable" to construe some of the Secretary's statements that are literally false – such as the assertion that the Department of Commerce was "responding *solely* to the Department of Justice's request," Pet. App. 72a – as misleading. Undoubtedly, some statements that are literally untrue may not be misleading in context or may not be intended to mislead. That is why the intent of the author is an inference that can be reached only through understanding and reviewing the entire factual record. *See* Nangle, 59 Wash. U.L.Q. at 425 (a trial judge has "seen [the] entire mosaic unfold"). Further, Secretary Ross's public statements were hardly the only evidence suggesting an intent to conceal parts of the decision-making process, starting with the government's initial proffer of the administrative record, which lacked important documents reflecting the Secretary's actions and discussions prior to the request from the Department of Justice. Even if Secretary Ross's statements *could* be construed not to be misleading in context, the district court's finding of an intent to conceal was more than justified by its careful examination of the entire record.

Moreover, an intent to conceal was just one piece of the totality of evidence suggesting that the Secretary's proffered explanation was pretextual. The district court's 72-page exposition of the relevant evidence over a multi-year timeline, *see* Pet. App. 38a-129a, including dozens of separate data points suggesting that the voting-rights explanation was a pretext, more than justified its ultimate determination.

B. A Wealth of Empirical Evidence Supports the District Court's Finding That the Secretary's Explanation Lacked a Logical Connection to the Evidence Before Him

Although the Secretary's own stated priority in adding the citizenship question was to obtain complete and accurate data, *see* Pet. App. 289a-290a, the district court found that Secretary Ross's explanations "were unsupported by, or even counter to, the evidence before the agency" in a number of ways, *id.* at 285a. Among the most important were Secretary Ross's assertions that there was no empirical evidence that adding the question would cause a differential undercount, *id.* at 286a, and that adding the question would serve the purpose of obtaining complete and accurate data, *id.* at 289a-290a. As the district court explained, there was actually substantial evidence that a differential undercount would result, including multiple studies by the Census Bureau. *Id.* at 141a. The government's own expert testified that these analyses were sound and, if anything, understated the extent of the likely differential undercount. *Id.* at 144a-145a. That conclusion found support in analysis by multiple plaintiffs' experts, which provided important background expertise as well as specific evidence on the differential undercount. *Id.* at 146a-148a. And even though all of the evidence pointed in the same direction – that is, that a differential undercount would occur – the district court still undertook a searching review of these experts' opinions, concluding that it would not rely on certain parts of these opinions for various reasons. *See id.* at 147a-148a nn.36-37.

The district court also explained why the evidence before the agency contradicted the Secretary's assertion that the addition of the question would result in

more complete and accurate data. Most significantly, the district court explained that the Census Bureau's own analyses came to the opposite conclusion. In particular, the Bureau's January 19, 2018 memorandum analyzed the likely effect of adding a citizenship question in three separate ways. Each analysis showed that adding the question would result in *less* complete data, as the question would decrease response rates. *Id.* at 47a-48a. Lower response rates would result in less accurate data, as the alternative methods of gathering information are less accurate; in turn, characteristics "imputed" to those not directly counted would be required for *more* people and, at the same time, reflect the *less* accurate data existing for those counted directly. *Id.* at 48a-49a & n.15.

The Bureau also concluded that even adding the citizenship question while, at the same time, using administrative records to gather citizenship data would result in lower quality data than using administrative records alone. This somewhat "counterintuitive[]" finding results from the complex interactions between data compilations. *Id.* at 52a-53a. The survey data would be inaccurate in several ways, but any incorrect identifications of citizenship could not be corrected feasibly. *Id.* The decrease in response rates and the inaccuracy of survey responses on the citizenship question would increase the number of people for whom citizenship is unknown or incorrect – and, among other things, the decreased response rates would lead to less linkage between responses and administrative records. *Id.* at 53a. It would also lead to less accurate data both because inaccurate characteristics would be imputed to non-responding individuals and because inaccurate self-reporting would, in some cases, be used instead of administrative records that are statistically more accurate. *Id.* at 54a-58a.

No expert testimony, or evidence before the Secretary when he made his decision, contradicted these analyses. The district court thus properly found that the Secretary's explanation in his memorandum could not be reconciled with the scientific evidence.

The government's criticisms of these factual findings are largely divorced from the record, and thus cannot show that the district court clearly erred. On the issue of whether a differential undercount would occur, the Secretary explained that there was "limited empirical evidence" that this was likely. *Id.* at 557a. But the government's explanation of how the Secretary reached this conclusion does not actually point to anything beyond the Secretary's own assertions. *See* Br. 30-31 (citing the Secretary's statement nine times, and no other record evidence). To assess whether the Secretary's decision was arbitrary and capricious under the APA, the district court necessarily had to *compare* the Secretary's rationale to the empirical evidence. Pet. App. 148a-151a. Pointing to the Secretary's statements cannot show that the district court erred in its assessment of that evidence.

The closest the government comes to offering a criticism of the district court's empirical findings is its argument that the court misinterpreted the Census Bureau's studies, because "some 22 million people for whom citizenship information would otherwise be unavailable" "will answer the citizenship question." Br. 33 (emphasis omitted). That assertion, however, does not support the conclusion that the totality of resulting citizenship data will be either more complete or more accurate. Tellingly, the government cites no statistical analysis or expert testimony in support of *that* factual assertion. And, even if the government could point to contrary evidence, resolving scientific

disputes is a core competency of federal district courts, and a circumstance in which deference is "[p]articularly appropriate." *Silvester*, 138 S. Ct. at 950 (Thomas, J., dissenting from the denial of certiorari). The district court's well-supported finding that the Secretary's asserted goals could not be reconciled with the evidence before him are not clearly erroneous and should not be disturbed.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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April 1, 2019

APPENDIX

List of *Amici Curiae*

The Honorable **W. Royal Ferguson, Jr.** served as a District Judge of the United States District Court for the Western District of Texas from 1994 through 2013. From 2008 through 2013, he served as a member of the Judicial Panel on Multidistrict Litigation.

The Honorable **Nancy Gertner** served as a District Judge of the United States District Court for the District of Massachusetts from 1994 through 2011.

The Honorable **Stephen C. Robinson** served as a District Judge of the United States District Court for the Southern District of New York from 2003 through 2010.

The Honorable **Kevin H. Sharp** served as a District Judge of the United States District Court for the Middle District of Tennessee from 2011 through 2017. From 2014 through 2017, he served as Chief Judge of the District.

The Honorable **T. John Ward** served as a District Judge of the United States District Court for the Eastern District of Texas from 1999 through 2011.